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Supreme Court of the United States

OCTOBER TERM, 1940.

SARGENT & COMPANY, a corporation, BAXTER, KELLY & FAUST, INC., a corporation, M. B. FITZGIBBON, doing business under the firm name and style of M. B. FITZGIBBON CO., and ANNA LOUISE LINAHAN,

Petitioners,

against

AGATHA L. MOORE, BASIL MOORE, MARGARET WIKSTROM, VINCENT JOYCE and M. HAROLD HIGGINS, and J. P. LINAHAN, INC., debtor in proceedings to reorganize a corporation under the National Bankruptcy Act,

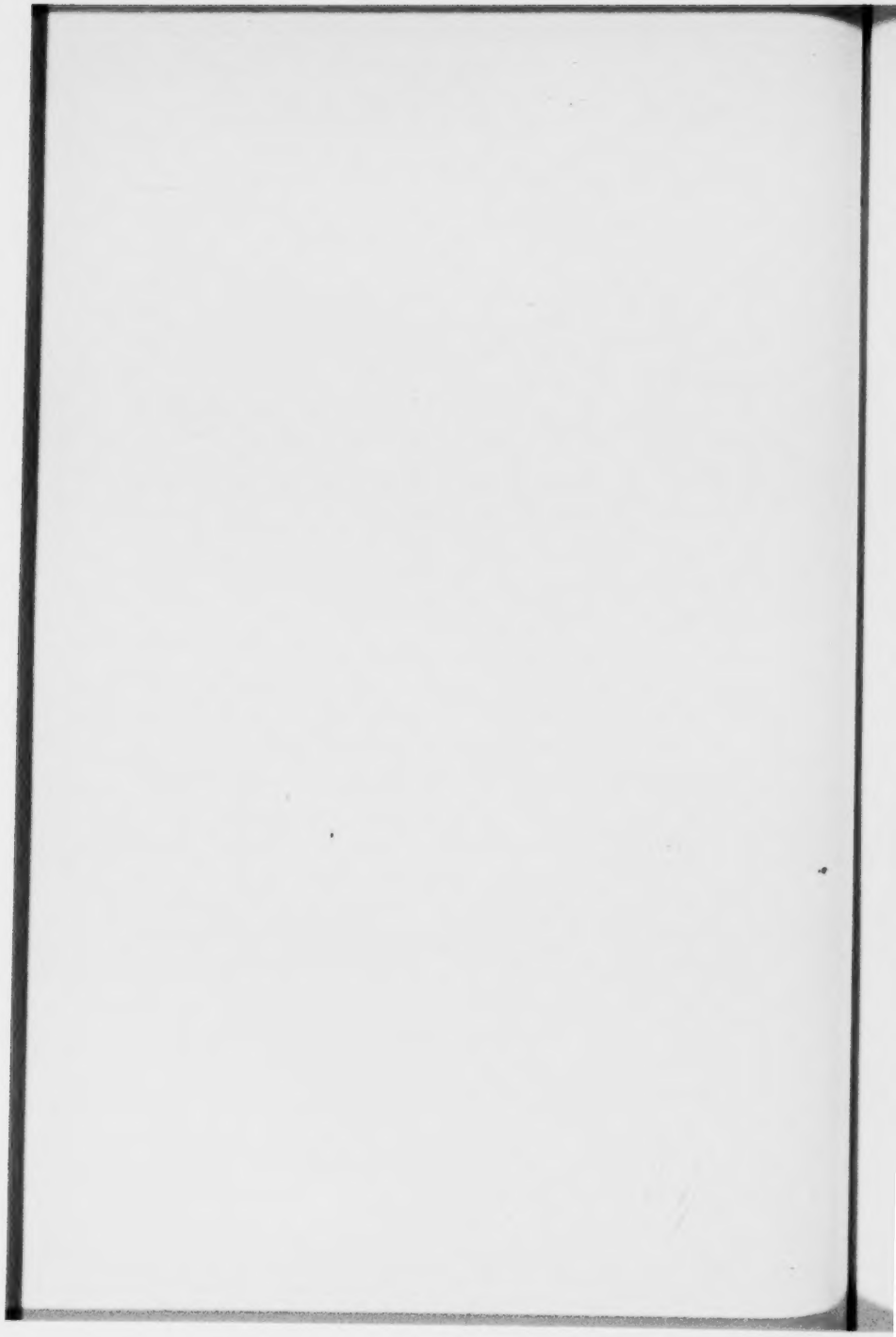
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

WEINSTEIN & LEVINSON,
Attorneys for Agatha L. Moore, Basil Moore, Margaret Wikstrom, Vincent Joyce and M. Harold Higgins, answering majority stockholders, and Agatha L. Moore, answering creditor, Respondents.

BAAR, BENNETT & FULLEN,
Attorneys for J. P. Linahan, Inc., Debtor, Respondent.

FRANK WEINSTEIN,
SAMUEL J. LEVINSON,
JOHN P. HURLEY,
of Counsel.



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IN THE

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OCTOBER TERM, 1940.

SARGENT & COMPANY, a corporation, BAXTER, KELLY & FAUST, INC., a corporation, M. B. FITZGIBBON, doing business under the firm name and style of M. B. FITZGIBBON CO., and ANNA LOUISE LINAHAN,

Petitioners,

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AGATHA L. MOORE, BASIL MOORE, MARGARET WIKSTROM, VINCENT JOYCE and M. HAROLD HIGGINS, and J. P. LINAHAN, INC., debtor in proceedings to reorganize a corporation under the National Bankruptcy Act,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement.

This is an application by three creditors of J. P. Linahan, Inc., who filed an involuntary petition for reorganization under Chapter X of the Bankruptcy Act, and by Anna Louise Linahan, a minority stockholder, for a writ of certiorari to review an order of the United States Circuit Court of Appeals for the Second Circuit, filed on February 14, 1941 (R. 725) insofar as that order reverses an order made on May 18, 1940, by the United States District Court for the Southern District of New York

(R. 65). This order of the Circuit Court granted permission to J. P. Linahan, Inc., the debtor, to serve and file an amended answer to the involuntary petition.

The order of the District Court dated May 18, 1940, which was reversed in its entirety, approved the findings of fact, conclusions of law and the report of the Special Master, and approved the involuntary petition of the creditors and the original answer of the debtor as properly filed under Chapter X of the Bankruptcy Act (R. 65-67). As the powers of the Special Master were expressly limited to the taking of evidence and reporting to the District Court with his recommendations (R. 157), and as the order of the District Court confirming the Special Master's report was entirely reversed and as this order of reversal was made the order of the District Court, it necessarily follows that the findings of fact and conclusions of law of the Special Master stand unapproved.

Opinions Below.

The petitioners do not seek to review, as claimed by them, the opinion of the Circuit Court of Appeals, Second Circuit, dated January 27, 1941, which is reported as *Moore* v. *Linahan* in 117 Fed. (2nd) 140 (R. 718-724), but only one isolated portion of the opinion, which relates to the granting by the Circuit Court, in its discretion, to the respondent debtor, of permission to file an amended answer to the involuntary petition. The opinion relates to 10 separate orders in this proceeding which were appealed from. The petition for certiorari seeks a review of only so much of the order of the Circuit Court, which reversed the order of the District Court of May 18th, 1940, and which granted leave to the debtor to file a new answer. The foregoing opinion of the Circuit Court of Appeals likewise refers to its prior opinion rendered

in this proceeding in *In re J. P. Linahan & Co.*, 111 Fed. (2nd) 590 (R. 719). The decision of the Circuit Court of Appeals as embodied in this last-mentioned opinion, reversed an injunction granted by the District Court on March 20, 1940 which prevented the respondents, majority stockholders of the debtor from electing directors of their own choice (R. 719). This injunction, in turn, wrongfully prevented the debtor, through its new Board of Directors, from filing an amended answer within the statutory period (R. 719).

Jurisdiction to Grant Certiorari is Lacking, And, in Any Event, Should Not Be Exercised.

(1) The granting of permission by the Circuit Court of Appeals to the debtor to serve an amended answer was an act of procedural discretion.

The Circuit Court of Appeals granted permission to the debtor to serve an amended answer, not as a matter of right, but in the exercise of its sound discretion.

On July 5, 1940, the District Court signed an order denying the application made by the debtor through its majority stockholders and directors, for leave to reopen the order of confirmation, and granting leave to the debtor to serve and file an amended and supplemental anwer (R. 228-9). An appeal was taken from this order (R. 143) and the Circuit Court dismissed this appeal as moot, but granted the debtor leave to file a new answer (R. 725). The mandate issued by the Circuit Court provided as follows:

> "The appeal from the order of July 5th denying leave to reopen the order of confirmation is dismissed, but the debtor is granted leave to file a new answer."

The permission to the debtor to serve a new amended answer was granted in the sound discretion of the Circuit Court and is not the proper subject of review by this Court.

> *Clawans* vs. *Whiteford*, 55 Fed. (2nd) 1037 (cert. denied 287 U. S. 605.

(2) The amended answer was duly served and filed on April 8, 1941, and the original answer of the debtor which consented to the involuntary petition, has already been withdrawn. The questions of law sought to be reviewed are therefore moot.

> *Mills* vs. *Green*, 159 U. S. 651, 653;
> *In re Smith* 71 Fed. (2nd) 378, 381, following the decision of this court in *American Book Co.* vs. *Kansas*, 193 U. S. 49;
> *Bennell Realty Co.* vs. *E. G. Shinner & Co., Inc.*, 87 Fed. (2nd) 824, (cert. denied, 302 U. S. 693).

The mandate of the Circuit Court of Appeals dated February 13, 1941, was duly filed in the office of the Clerk of the District Court on February 14, 1941. On April 3, 1941, an order of the District Court was entered making the order of the Circuit Court of Appeals the order of said District Court. This order, in part provided:

> "* * * but the debtor be, and it is hereby granted leave to file a new answer within twenty days after the filing of this order; * * *".

Such new answer, in the form of the debtor's amended answer, was duly served on the attorneys for the petitioners on April 8th, 1941 and accepted by them, and the original amended answer with proof of service was

duly filed on said day in the office of the Clerk of the District Court. No application was made by the petitioners for a stay of the mandate or a stay of any of the proceedings herein, pending the present application for a writ of certiorari. As the debtor has already duly served and filed its amended answer which withdrew the original answer, the question of the propriety of the filing of such amended answer is now moot.

Facts.

The annual meeting of stockholders of the debtor for the election of directors was scheduled to take place, in accordance with the provisions of its By-Laws, on February 24th, 1940 (R. 232). Four days prior thereto, and on February 20, 1940, three creditors of the debtor filed an involuntary petition for a reorganization of the debtor under Chapter X of the Bankruptcy Act (R. 232), alleging that the debtor is insolvent, that various acts of bankruptcy were committed, and that it was the desire of the petitioners to eliminate the stockholders' interest (R. 232; 5-13).

On the very next day, the debtor signed a sworn answer, appearing by George J. Corbett, Esq., as its attorney, in which it consented to the immediate approval by the Court of said involuntary petition, and which did not controvert a solitary allegation of fact set forth in such petition (R. 232; 13-17). Mr Corbett was, for a number of years, and up to about 2 weeks prior to the filing of the petition, a director and treasurer of the debtor, and the personal attorney for the respondent Agatha L. Moore and her family (R. 232-3). It was his duty, as treasurer, to countersign all checks. It is evident that no preferential payments could possibly have been made to any creditors without his approval (R. 233).

The respondent Agatha L. Moore and her family, who were majority stockholders of the debtor since 1924 (R. 233) relied upon his advice and his agreement, as their personal attorney, to look after and protect their interests. They permitted the directors of the debtor to be nominated and elected under his directions. Mr. Corbett resigned as a director and treasurer on February 6, 1940, when it became evident that some legal proceedings would have to be taken in the Bankruptcy Court for the protection of the debtor. Mr. Corbett, appearing as the attorney for the debtor, filed an answer consenting to the reorganization of the debtor as prayed for by the petitioning creditors, thereby opposing his former clients in their request that a petition for an arrangement be filed under Chapter XI of the Bankruptcy Act, and that the annual meeting of stockholders be held as promptly as possible so that the stockholders could exercise their legal right to vote for the election of directors (R. 233).

This answer was filed notwithstanding the fact that this attorney knew that the involuntary petition expressly alleged that it was the desire of the petitioning creditors to eliminate the interests of all stockholders (R. 233). At such time, the respondent Agatha L. Moore was the record owner of 1700 shares of common stock of the debtor, having a par value of $170,000 which was more than a majority of the issued stock (R. 233). The schedule annexed to the petition showed that the debtor had gross assets of about $416,000 and liabilities of about $234,000 (R. 12-13, 233).

On the same day that this answer was prepared, Lester S. Berry, as President, and James W. Lynch, as Secretary, signed a certificate indicating that appropriate resolutions of the directors were passed approving such involuntary petition (R. 15-17, 233-4).

A stockholders' meeting was not called in order to obtain their consent for such approval (R. 234). Such reso-

lutions were passed with full knowledge of the fact that they were directly opposed to the desires of the majority stockholders, and just a few days before the date set for the annual meeting of stockholders of the debtor, when a new Board of Directors was to be elected (R. 234). This answer was drafted by the attorney for the petitioning creditors and typewritten in final form by the attorney for the petitioner, Mrs. Anna Louise Linahan, a minority stockholder and a sister-in-law of the respondent Agatha L. Moore, who has asserted large claims and threatened suit against said respondent and her family, based on alleged transactions which are unrelated to this proceeding (R. 63, 234, 701). She also filed an answer as a minority stockholder joining in the request for a reorganization as demanded in the petition (R. 31-33).

It is apparent that the filing of the involuntary petition on February 20, 1940, and the verification of the answer by the debtor on the following day consenting to such petition, were for the purpose of preventing the holding of such annual meeting of stockholders then set for February 24, 1940, and in order to prevent the stockholders from electing directors of their own choice (R. 234). This answer was actually filed on February 23rd, 1940, one day before the day set for the annual meeting of stockholders (R. 234).

In the meantime, Agatha L. Moore, one of the respondents, as a creditor of the debtor then holding its promissory notes in excess of $37,000, filed an answer controverting the allegations of the involuntary petition and setting up an affirmative defense to the effect that it was not filed in good faith in that adequate relief could be obtained by the debtor under the provisions of Chapter XI, and that it is unreasonable to expect that a plan of reorganization can be effected as prayed for by the petitioning creditors (R. 20-22).

An answer was also filed by the respondents Agatha L. Moore, Basil Moore, Margaret Wikstrom, Vincent Joyce and M. Harold Higgins as stockholders of record of the debtor together owning in excess of 60% of all its issued and outstanding capital stock (R. 23-31). This answer also controverted the material allegations of the involuntary petition, alleged that the debtor was solvent, that adequate relief could be obtained under Chapter XI and that the answer of the debtor consenting to the petition was fraudulently filed and in violation of the fiduciary obligations which the directors owed to the stockholders of the debtor (R. 23-31), and also set up an affirmative defense pleaded derivatively in behalf of the debtor, alleging that the answer filed by the debtor was filed fraudulently and in violation of the fiduciary obligations owed by the directors to the stockholders (R. 27-30).

On February 26, 1940, an order to show cause was obtained by the respondents Agatha L. Moore, Basil Moore, Margaret Wikstrom, Vincent Joyce and M. Harold Higgins, together owning 1800 shares or more than 60% of all of the issued and outstanding stock of the debtor, for an order granting them permission to hold the annual stockholders' meeting for the election of directors and for other relief (R. 234).

On March 14, 1940, the petitioning creditors procured an order to show cause to enjoin a special stockholders' meeting which had been called by the individual respondents for the express purpose of passing appropriate resolutions condemning the actions of the Board of Directors in filing an answer consenting to the involuntary petition for reorganization under Chapter X, and authorizing counsel for the debtor to take appropriate legal proceedings to have such answer withdrawn or to procure permission of the court to file an amended answer in which the material allegations of the involuntary petition would be controverted and in which a demand would be made for

the dismissal of the involuntary petition. After argument of both motions, an order was entered on April 2, 1940, denying the motion of the respondents for leave to hold the annual stockholders' meeting, and granting the motion of the petitioning creditors for an injunction restraining the holding of the special stockholders' meeting. An appeal was promptly taken to the Circuit Court of Appeals from such order.

The issues raised by the answers that were filed to the involuntary petition were referred to a Special Master "to hear and report generally as to all matters arising in this proceeding" (R. 151). Hearings were commenced on March 18, 1940 (R. 376) and concluded on April 6, 1940 (R. 595, 610). At such hearings Mr. Taylor, a member of the Creditors Committee, and a witness called on behalf of the petitioning creditors, testified that Mr. Trachman, the attorney for petitioner Anna Louise Linahan, was asserting a claim against respondent Mrs. Moore and her family on some outside transactions (R. 461) and that "he seemed to be more concerned with his other claims than with anything else" (R. 462). The evidence indicates that the petitioner Anna Louise Linahan, filed an answer as a stockholder consenting to a reorganization of the debtor under Chapter X (R. 31-33), primarily for the purpose of forcing the majority stockholders to settle the litigation pending between them and said Anna Louise Linahan. On April 26, 1940, the Special Master filed his report recommending the approval of the involuntary petition (R. 68-89).

On May 6, 1940, the Circuit Court of Appeals reversed the aforesaid order appealed from (*In re J. P. Linahan, Inc.*, 111 Fed. [2nd] 590), and a mandate was duly issued accordingly on May 7th, 1940, and filed in the office of the Clerk of the District Court on May 8, 1940, which mandate directed that the order of April 2, 1940, denying the motion of the respondents for leave to hold the annual

stockholders' meeting and granting the motion of the petitioning creditors for an injunction restraining the holding of a special stockholders' meeting, be reversed, and such meeting be permitted to be held.

On May 10, 1940, an order was entered making the mandate of the Circuit Court the order of the District Court (R. 235).

On May 10, 1940, the annual meeting of stockholders for the election of directors was held, and 5 directors were elected subject to the approval of the District Court. Thereupon and upon the same day, an order to show cause was procured returnable May 14, 1940, for an order approving the election of such directors (R. 235).

On May 11, 1940, a special meeting of stockholders in accordance with the provisions of the By-Laws was duly held. This was the meeting which was originally scheduled to be held on March 16, 1940, and which was enjoined by the entry of the order dated April 2, 1940, granting the motion made by the petitioning creditors and joined in by the petitioner, Anna Louise Linahan. This was the order which was reversed by the Circuit Court on May 6th, 1940. At this meeting, resolutions were duly passed opposing the involuntary petition and requesting the directors and counsel for the debtor to take appropriate legal proceedings in order to procure permission of the District Court to strike out the original answer of the debtor as illegally filed, or in the alternative, for leave to serve and file an amended and supplemental answer for the debtor controverting the material allegations of the petition, and seeking its dismissal (R. 238-9).

On May 13, 1940, an application was made in behalf of the majority stockholders and on behalf of the respondent Agatha L. Moore as answering creditor, returnable on May 15, 1940, for an order staying the hearing on the application to confirm the Special Master's report dated April 26, 1940, until after the determination by the

District Court of the application which was intended to be made in behalf of the debtor for leave to file an amended supplemental answer in its behalf and for leave to reopen the trial of the issues before the Special Master accordingly (R. 235-6). This motion for a stay was denied by order dated May 18, 1940 (R. 46).

On May 18, 1940, the court signed an order approving the Special Master's report dated April 26, 1940, and approving the involuntary petition and the answer of the debtor as being properly filed under Chapter X of the Bankruptcy Act (R. 65-67).

On May 27, 1940, an order was signed approving the election of the five directors who were nominated and voted for by the majority stockholders (R. 238). The respondents, notwithstanding the fact that they acted as speedily as possible, were not in a legal position to make any motion for leave to serve an amended and supplemental answer until the new directors elected by them were first approved by the District Court (In re J. P. Linahan, Inc., 111 Fed. [2nd] 590, at 591, 592). The majority stockholders were thus delayed until May 27th, 1940 (R. 236, 246), in having control of the debtor's Board of Directors, notwithstanding the fact that they specifically called the court's attention to the urgency of having an order entered promptly approving the election of the new directors (R. 634). In the meantime, from February 20th, 1940, the date when the involuntary petition was filed, the debtor was in the control of a hostile and unfaithful Board of Directors who were selfishly acting for their own personal interests. This delay was due entirely to the illegal objections made by the petitioners which were originally sustained by the District Court and unanimously reversed by the Circuit Court of Appeals on May 6th, 1940 (R. 238). The petitioners originally gained a legal advantage by their own illegal acts. By frustrating the holding of the annual meeting scheduled to be held

on February 24th, 1940, they wrongfully prevented the debtor, through a new Board of Directors who could then have been elected by the individual respondents, from filing an amended answer for the debtor controverting the material allegations of the involuntary petition and demanding its dismissal (R. 238).

On June 3, 1940, a special meeting of directors was held at which similar resolutions were duly passed authorizing an application to be made to the District Court for permission, in behalf of the debtor, to serve and file an amended and supplemental answer (R. 238), which answer would controvert the material allegations of the involuntary petition, and instead of consenting to reorganization under Chapter X, would seek its dismissal (R. 238).

At the time of the filing of the involuntary petition, the debtor was solvent and no act of bankruptcy had ever been committed (R. 422-3, 695, 513-4).

At the trial of the issues before the Special Master, James W. Lynch, the Secretary and Treasurer of the debtor, who was called as a witness by the petitioning creditors, testified that at a fair valuation of the assets of the debtor, it had approximately $182,000 assets over and above its liabilities (R. 422-3), and that the book value of the shares of stock of the corporation was about $50 per share (R. 240, 449). The report of certified public accountants appointed by the District Court, which report was adopted by the court (R. 71-2), indicates that the debtor, at the time of the filing of the petition, was solvent, having a net worth of $134,505.99 (R. 695, 597). Mr. Scully, the attorney for the petitioning creditors, testified that the creditors always wanted 100 cents on the dollar (R. 509), and that they always thought that the company was solvent (R. 508). He further testified as follows (R. 513-4):

> "Q. When you filed the involuntary petition did you know that no Act of Bankruptcy or that any

Act of Bankruptcy had been committed by this Debtor? A. I don't know it now."

At the time the original answer was filed on behalf of the debtor, the total stock ownership of the then Board of Directors constituted less than 5% of the entire issued and outstanding stock of the debtor. At such time both the president and secretary were still indebted to the debtor for monies borrowed by them (R. 240, 695).

The Nahanil Realty Corporation, a creditor having liquidated claims against the debtor in large sums, and all the stock of which is owned by respondent Agatha L. Moore and her family, is likewise opposed to such involuntary petition. The total claims of the corporation and respondent Agatha L. Moore represent more than one-third of the total debts due by the debtor (R. 13, 438). The debtor has no secured obligations or debts (R. 34, 435).

On July 5, 1940, an order was entered denying the application made by the debtor through its majority stockholders and newly elected directors, for an order vacating and setting aside the order of the District Court made on May 18, 1940, which approved the involuntary petition, and for leave to reopen the trial of the issues before the Special Master, and granting leave to the debtor to serve and file an amended and supplemental answer (R. 228-9).

On January 27, 1941, the Circuit Court of Appeals reversed the order the of the District Court dated May 18, 1940 which confirmed the Special Master's report dated April 26, 1940, dismissed the appeal from the order of the District Court dated July 5, 1940 which denied leave to the debtor to reopen the order of confirmation, but granted the debtor leave to file a new amended answer, affirmed some other interlocutory orders, reversed others, and dismissed some appeals from some of the other orders as moot (R. 726), and directed a new trial to be had on the new issues to be raised by the new

amended answer (R. 725). Such new trial has as yet not been held, but there is now pending undetermined a motion by the debtor for judgment on the pleadings or in the alternative for summary judgment dismissing the involuntary petition, which motion has been adjourned, upon the petitioners' application, pending the decision by this Court on the present application for a writ of certiorari.

A summary of the respective parties and the position taken by them in this proceeding, is as follows:

In Favor of the Chapter X Proceeding:

(1) Sargent & Company, *et al.*, Petitioning Creditors, Petitioners—Claim in their petition to represent 7 creditors whose claims aggregate $71,717.31 (R. 6-7).

(2) Anna Louise Linahan, Petitioner—A stockholder owning 25% of the capital stock of the debtor; the sister-in-law of respondent Agatha L. Moore; has asserted large claims against Mrs. Moore and her family; has other litigation pending between herself and said respondent. The debtor has filed a counterclaim against the Estate of J. P. Linahan, deceased, of which Anna Louise Linahan is the executrix, for over $150,000 in an action which is still pending undetermined (R. 693, 701).

(3) J. P. Linahan, Inc., acting through Lester S. Berry, its President, and James W. Lynch, its Secretary & Treasurer, as debtor in possession, appellee in the Circuit Court of Appeals, but not appearing in this court. The District Court has drawn a distinction between a debtor and a debtor in

possession (R. 218, 281). The debtor in possession, as distinguished from the debtor, was an appellee in the Circuit Court of Appeals. Lester S. Berry, its president, and James W. Lynch, its Secretary & Treasurer, were those responsible for the filing of the original answer on behalf of the debtor on February 23, 1940, consenting to the Chapter X proceeding, notwithstanding the protest of the majority stockholders (R. 13-19). Both Berry and Lynch are indebted to the debtor in sums of money which they borrowed (R. 690). Berry owns 60 shares of stock or about 2% of the entire issued capital stock of the debtor, and Lynch owns 10 shares or about ⅓ of 1% thereof. Berry formerly procured a discharge in bankruptcy, acting through Trachman, who is also the personal attorney for the petitioner Anna Louise Linahan. Through this proceeding he discharged a debt of $8500 due to the debtor. The respondent Agatha L. Moore and her family subsequently voluntarily contributed $6000 to the corporation so that this discharged debt could be paid as a result of which Berry procured the return of 60 shares of stock of the debtor which were pledged with the debtor as collateral (R. 240-2). He expressed his thanks to the respondent Agatha L. Moore in writing for this gift (R. 241). Under the management of Berry and Lynch, the debtor lost over $150,000 in the last three years (R. 515).

Opposed to the Chapter X Proceeding:

(1) J. P. Linahan, Inc., Debtor, Respondent—Acting through its new board of directors who were elected and approved by order of the court dated May 27, 1940 (R. 112).

(2) AGATHA L. MOORE, BASIL MOORE, MARGARET WIKSTROM, VINCENT JOYCE and M. HAROLD HIGGINS, Respondents—Answering stockholders owning more than 60% of the entire issued capital stock of the debtor (R. 437).

(3) AGATHA L. MOORE, Respondent—Answering creditor who has claims represented by promissory notes, in excess of $37,000. She and her family also own the stock of the Nahanil Realty Corporation, which corporation and Agatha L. Moore have liquidated claims against the debtor in excess of one-third of its total liabilities (R. 438). The Nahanil Realty Corporation owns the building occupied by the debtor as tenant (R. 692).

It is therefore apparent that the respondents are the ones who are vitally financially interested in successfully putting through a fair, equitable and feasible plan of reorganization through the medium of a petition for an arrangement under Chapter XI which can be filed pursuant to Section 147 as an amendment to the present involuntary petition, if the District Court should dismiss said petition.

Objections to the Petition.

The petitioners set forth five questions which they claim are involved in this application. Such questions are based upon a misconception of the decision of the Circuit Court of Appeals, upon a distortion of the evidence, and upon misstatements of fact.

The petitioners, on pages 2 and 3 of their petition, under the heading of "Questions Involved", set forth the five alleged questions which they claim are involved on their present application for a writ of certiorari.

The first question is as follows:

> "1. May a debtor which has invoked the jurisdiction of the Federal Court by filing prior to approval of an involuntary petition, a written admission of its inability to meet its debts as they mature, a consent to reorganization under Chapter X, and a request for approval of the Chapter X petition, defeat such jurisdiction by withdrawing such consent under the guise of filing an amended answer, although it appears after trial the debtor requires reorganization under Chapter X?"

The statement that it appears after trial that the debtor requires reorganization under Chapter X, is a misstatement of fact. One of the affirmative defenses set forth in the amended answer is that there is no need for reorganization by the debtor under Chapter X, as adequate relief can be obtained under Chapter XI. This will be one of the questions to be determined on the new trial, and new findings of fact and conclusions of law will necessarily have to be made by the Special Master and submitted to the District Court for its consideration. The majority stockholders in their answer to the involuntary petition claimed that the original consent to reorganization filed by the old board of directors which is referred to in the above quoted question, was filed fraudulently and by a collusive arrangement between the petitioning creditors, the old board of directors of the debtor, and the attorney for the minority stockholder Anna Louise Linahan (R. 25-27). All evidence in regard thereto was erroneously excluded at the trial of the issues before the Special Master (R. 443-4, 445, 575-6, 448).

The second alleged question, which is set forth on page 3 of the petition, is as follows:

> "II. Do the provisions of Sections 126 and 142 of Chapter X of the Bankruptcy Act prohibit a debtor

from expediting the proceeding by consenting to reorganization and requesting the approval of an involuntary petition?"

No such question is involved. The Circuit Court in its discretion granted permission to the debtor to file an amended answer because the debtor was wrongfully prevented from filing an amended answer within the statutory period. The Circuit Court, in its opinion (R. 719-20) said:

> "We start with the now incontravertible fact that it was unlawful to forbid the election of directors. It was only by virtue of the erroneous injunction that the old board continued in office, but by so doing it wrongfully prevented the new board from filing an amended answer within the time—twenty days after February 23rd—allowed them under Rule 15 (a). That answer would have withdrawn the debtor's consent to an approval of the petition and would have put in issue the act of bankruptcy along with all the other allegations of the petition."

The third alleged question which is set forth on page 3 of the petition, is as follows:

> "III. Does the creditors' petition in conjunction with the debtor's written admission of its inability to meet its debts as they mature, its consent to reorganization under Chapter X, and its request for approval of the Chapter X petition, satisfy the requirements of Secs. 130 and 131 of the Bankruptcy Act?"

This question has no possible bearing on the present application.

Upon the trial of the issues before the Special Master, the answer was amended on March 29th, 1940, so as to set forth denials of the allegations in the involuntary petition that the stock of the debtor was valueless, that

the company was insolvent, and that acts of bankruptcy had been committed (R. 493). It will be noted that this amendment was made by the debtor then acting through a hostile board of directors, as the new board was not yet approved by the court and could not become active directors until May 27th, 1940 (R. 112). Issues were therefore created which should have been tried as provided by Section 143 of the Bankruptcy Act.

The fourth alleged question, which is set forth on page 3 of the petition, is as follows:

> "IV. Was the Circuit Court required by Rule 15 (a) of the Federal Rules of Civil Procedure to permit the debtor to withdraw as a matter of right its written consent to reorganization under Chapter X and its request for approval of the Chapter X petition upon the basis of which the District Court had assumed jurisdiction?"

The Circuit Court granted permission to the debtor to serve an amended answer as an act of discretion because the debtor was originally wrongfully prevented from filing an amended answer in accordance with Rule 15 of the Rules of Civil Procedure.

Rule 15 of the Federal Rules of Civil Procedure, which are applicable to bankruptcy proceedings (General Order in Bankruptcy 37), provides in part as follows:

> "Rule 15. Amended and Supplemental Pleadings.
>
> * * * * *
>
> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The fifth alleged question, set forth on page 3 of the petition, is as follows:

> "V. Do the directors of a corporation in financial distress require the approval of the majority stockholders in order to consent to the jurisdiction of a court for a reorganization proceeding?"

The Circuit Court in its opinion recognized the fact that directors of a corporation who act in good faith would not require the consent of its stockholders (R. 724). It expressly set forth, however, that where directors acted in bad faith and in fraud of the rights of the stockholders of the company, the court of bankruptcy can properly prevent the perpretation of fraud (R. 724). The Circuit Court, in its opinion (R. 719) states:

> "* * * the directors of the debtor probably knew in advance of this proceeding, and possibly they inspired it; * * *."

This opinion further refers to the fact that the original answer was filed by the old Board of Directors, one day before February 24th, 1940, the date set for the annual meeting of stockholders when all of the old directors would have gone out of office (R. 719), and when such directors knew that their acts were against the desires of the majority stockholders (R. 724).

The petitioners, in their brief, lay particular stress upon findings of fact made by the Special Master to the effect that there was no fraud on the part of the old board of directors, and other findings, claiming that such findings have not been overruled by the Circuit Court. Such statements are contrary to the facts.

There is Now No Approval by the District Court of Any of the Findings of Fact or Conclusions of Law Made by the Special Master.

The Special Master was appointed "to hear and report generally as to all matters arising in this proceed-

ing" (R. 157). On April 26, 1940, the Special Master filed his report recommending the approval of the involuntary petition, and setting forth findings of facts and conclusions of law (R. 68-89). This report was confirmed on May 18, 1940, by the District Court (R. 65-67). The Circuit Court, however, completely reversed this order of confirmation (R. 724, 726).

The mandate of the Circuit Court dated February 13, 1941, and filed in the office of the Clerk of the District Court on February 14, 1941, provided:

> "IT IS HEREBY
>
> Ordered, Adjudged and Decreed
>
> That the order of confirmation of said District Court be and it hereby is reversed."

The order of the District Court dated March 31, 1941, and filed in the office of the Clerk of the District Court on April 3, 1941, made the foregoing mandate of the Circuit Court the order of the District Court, and after referring to the fact that the appeal was taken from the order signed by Hon. Alfred C. Coxe, District Judge dated the 18th day of May, 1940, confirming the findings of fact, conclusions of law and the report of the Special Master dated April 26, 1940, and approving the involuntary petition and the answer of the debtor, provided:

> "* * * and it is further
>
> ORDERED, ADJUDGED AND DECREED, that the order of confirmation signed by Hon. Alfred C. Coxe, District Judge, dated May 18th, 1940, be and the same hereby is reversed;".

It is clear, therefore, that when the order of confirmation dated May 18, 1940 (R. 65-67) was reversed by the

Circuit Court, the entire order was reversed, and not an isolated portion thereof, as claimed by the petitioners.

There is, therefore, no order in effect which confirmed the Special Master's report or any part thereof.

Furthermore, General Order No. 47 in Bankruptcy provides as follows:

> "No. 47. Reports of Referees and Special Masters.
>
> Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

After a trial of the new issues raised by the amended answer on behalf of the debtor which has already been served and filed, it will be necessary for the Special Master to submit new findings of fact and conclusions of law, and it will then be the duty of the District Judge either to adopt, modify or reject same in accordance with the foregoing General Order.

Furthermore, it is apparent from the opinion of the Circuit Court that there was no intent to confirm any of the findings of the Special Master, because the trial of the original issues before the Special Master was conducted on the original answer filed by the debtor, consenting to the involuntary petition, particularly where the debtor, acting through its old board of directors, appeared by its own attorney and cooperated with the petitioning creditors in an effort to sustain the petition (R. 13-19). The Circuit Court, however, in its opinion, granted leave to the debtor to withdraw the original answer and serve a new amended answer which would con-

trovert the material allegations of the involuntary petition and seek its dismissal. The Circuit Court of Appeals, in its opinion, said (R. 725):

> "After the amended answer has been filed the case will be tried upon the new issues."

All of the findings of fact and conclusions of law therefore, made by the Special Master, and which were based on the original answer of the debtor consenting to the involuntary petition, stand unapproved. The only order which approved such findings was reversed.

The statements, therefore, contained in the petitioners' brief that the Circuit Court has not overruled any of the findings of fact made by the Special Master or in any way disturbed them, and that such findings are at the present time in effect, are contrary to the facts.

The respondents have at all times denied that the debtor is insolvent (R. 20, 23) and have claimed that the debtor, at the time of the filing of the involuntary petition, was, and now is solvent, having assets at a fair valuation far in excess of all its liabilities (R. 25). None of the respondents have ever filed, as claimed on page 3 of the petition herein, any proposed plan of reorganization in this proceeding. Nor have the majority stockholders ever represented their stock to be worthless, as is set forth on page 5 of the petition, but have always denied such fact (R. 538).

The statement made on page 5 of the petition that the majority stockholders repeatedly represented the stock to be worthless, is a misstatement of fact. The only time that there was any testimony of an alleged claim by the majority stockholders that their stock was worthless, was when Mr. Taylor a witness on behalf of the petitioning creditors, stated that such statements were only made in connection with a discussion as to what would be realized in the event there was a liquidation of the assets of the debtor (R. 463).

POINT I.

The decision of the Circuit Court of Appeals for the Second Circuit is not in conflict with the decisions of the Seventh and Third Circuits and of this court, and of the Court of Appeals of the State of New York, but on the contrary, is in strict conformity therewith.

The petitioners claim that the present decision of the Circuit Court is in conflict with the decisions of the Circuit Court of Appeals for the Seventh and Third Circuits, referring to *In Re Palisades-on-the-Desplaines,* 89 Fed. (2) 214 (C. C. A. 7); *In re Park Beach Hotel Bldg. Corp.,* 96 Fed. (2) 886 (C. C. A. 7); *Snyder* v. *Fenner,* 101 Fed. (2) 736 (C. C. A. 3).

There is no such conflict. The foregoing decisions were rendered before the enactment of the Chandler Act, and related to the construction of Section 77 B, subdivision A of the Bankruptcy Act, which provided that an answer of the debtor which admits the jurisdiction of the court, the material allegations of the petition, and consents to reorganization under that section, automatically converted the involuntary petition into a voluntary one, making it unnecessary to prove acts of bankruptcy on the part of the debtor.

The Circuit Court in the present decision (R. 721) states:

> "Chapter X did away altogether with the answer as a voluntary petition; Sec. 127 is all that remains of the earlier law and it merely allows the debtor to petition for reorganization either before or after adjudication. Thus it appears that, at least when the reorganization emerges from a liquidation, an answer can no longer serve as a petition; and, if so, it is incredible that it should retain that office when interposed in a reorganization proceeding itself."

There is no decision of the Circuit Court of Appeals for the Seventh Circuit or Third Circuit or any other

Circuit which is in conflict with the foregoing decision of the Circuit Court above quoted.

The petitioners also claim that the decision of the Circuit Court conflict with the decision of the Court of Appeals of the State of New York, in *People ex rel. Manice* v. *Powell*, 201 N. Y. 194, 200, 201.

The Circuit Court, in its opinion stated (R. 724):

> "Be that as it may, we need not too much regret it even if in this instance form may prevail, because, although directors, so long as they hold office and use an honest judgment, are immune from the control of their shareholders, *People ex rel. Manice* v. *Powell*, 201 N. Y. 194, 200, 201, the power to commit a corporation one day before they know they are to be displaced, to a course known to be disapproved by the majority is not one to be generously extended. Normally the shareholders should have their way."

The Circuit Court cites with approval the case of *People ex rel. Manice* v. *Powell*, 201 N. Y. 194. In the case at bar, the directors were accused of fraudulently filing an answer consenting to the involuntary petition, and of fraudulently preventing the majority stockholders from electing a new board of directors who could have legally filed an amended answer, if they had not been improperly enjoined from holding the annual meeting for the election of directors. The respondents do not question the fact that honest directors, who honestly hold office and use honest judgment, are immune from the control of stockholders. This was recognized by the Circuit Court, which specifically pointed out that in this particular case the charges of fraud and bad faith on the part of the old board of directors were sustained, the Circuit Court stating (R. 719) as follows:

> "On February 20, 1940, three creditors of the debtor filed a petition to reorganize it under Chapter X; the directors of the debtor probably knew in ad-

vance of this proceeding, and possibly they inspired it; at any rate on the 21st they met and passed a resolution that the debtor thereby declared its inability to pay its debts and consented that the petition should be approved and that the debtor should file (fol. 720) an answer to that effect. This it did on the 23rd, although all five directors would have gone out of office on the 24th, the day of the annual meeting of shareholders."

Nor is there any conflict between the foregoing decision of the Circuit Court and this Court's decision in *Royal Indemnity Co.* v. *American Bond & Mortgage Co.*, 289 U. S. 165. The record is replete with evidence showing that the old board of directors acted in bad faith and in fraud of the rights of stockholders (R. 507, 511, 512). The very fact that the debtor acting through its old Board of Directors filed an answer (R. 14) consenting to a reorganization which sought to eliminate the rights of all stockholders (R. 8) of a solvent company, is in itself a fraud and a clear violation of the fiduciary obligations which the directors owed to its stockholders.

Kavanaugh v. *Kavanaugh Knitting Co.*, 226 N. Y. 185, 193, 196;
Pollitz v. *Wabash R. R. Co.*, 207 N. Y. 113, 124.

The evidence is conclusive that the answer was filed on February 23rd, 1940, with full knowledge that the annual meeting of stockholders was to take place on February 24th, 1940, for the election of directors (R. 507, 512). Its purpose was to prevent the holding of this meeting, thereby depriving the stockholders of a vested property right to vote for directors of their own choice.

In re J. P. Linahan, Inc., 111 Fed. (2d) 590;
Lord v. *Equitable Life Assurance Society*, 194 N. Y. 212.

POINT II.

The original answer of the debtor did not convert the involuntary proceeding into a voluntary one so as to make it unnecessary for the petitioning creditors to prove insolvency or acts of bankruptcy.

(1) There is no statutory provision under Chapter X for the conversion of an involuntary petition for reorganization into a voluntary one as was formerly permitted under Section 77 B (a).

Section 18 b of the Bankruptcy Act, before its amendment by the Act of June 22, 1938, provides as follows:

> "The bankrupt, or any creditors, may appear and plead to the petition within 5 days after the return day, or within such further time as the court may allow."

After its amendment by the Chandler Act, it now provides as follows:

> "The bankrupt and, in the case of a petition against a partnership, any general partner or, in the case of a petition in behalf of a partnership, any general partner not joining therein, may appear and plead to the petition within five days after the return day or within such further time as the court may allow."

It will be noted, therefore, that the right which creditors previously had to file an answer to an ordinary involuntary petition in bankruptcy has now been abolished.

See:

Matter of National Republic Co., 109 Fed. (2nd) 167 (C. C. A. 7th, 1940).

Under former Section 77 B (a) of the Bankruptcy Act, 3 or more creditors who had provable claims which

amounted in the aggregate in excess of the value of the securities held by them to $1000 or over, or stockholders owning 5 per centum in number of all shares of stock of any class of the debtor, were given the right to file an answer to a petition or an answer of the debtor which sought reorganization under that section.

When Chapter X of the Chandler Act was enacted, the above restrictions were removed by Sec. 137 and the absolute and unrestricted right was given to any creditor, or if the debtor was not insolvent, to any stockholder, to file an answer to an involuntary petition for a reorganization. Section 137 provides as follows:

> "SEC. 137. ANSWER BY CREDITOR, INDENTURE TRUSTEE OR STOCKHOLDER; TIME LIMIT.—Prior to the first date set for the hearing provided in section 161 of this Act (Sec. 561 of this title), an answer controverting the allegations of a petition by or against a debtor may be filed by any creditor or indenture trustee or, if the debtor is not insolvent, by any stockholder of the debtor. (June 22, 1938, c. 575, Sec. 1, 52 Stat. 887.)"

In *Thomas K. Finletter's treatise on the Law of Bankruptcy Reorganization,* at page 647, it is stated:

> "An especially alert creditor thus has some opportunity to investigate the facts as to the debtor's solvency and to appeal from the order within the statutory period."

Section 144 of Chapter X provides for a determination of the issues raised by such an answer. This Section provides:

> "SEC. 144. DETERMINATION OF ISSUES RAISED BY CREDITORS', INDENTURE TRUSTEE'S OR STOCKHOLDER'S ANSWER.—If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of

> the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter (Secs. 501 to 676 of this title) and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied. (June 22, 1938, c. 575, Sec. 1, 52 Stat. 887.)"

It is therefore apparent that under Chapter X, an answer may be filed by a creditor or stockholder controverting the allegations of a petition by or against the debtor, in which event the issues thus raised must be determined by the court. There is no provision under Chapter X which provides that a determination of such issues can be dispensed with in any manner, shape or form. Nor is there any provision under Chapter X which provides that the filing of an answer by the debtor admitting the allegations of the petition and consenting to a reorganization, converts the involuntary proceeding into a voluntary one. Such provisions were previously expressly provided for in Section 77 B, subdivision (a), which in part contained the following provision:

> "If such answer shall admit (a) the jurisdiction of the court, and (b) the material allegations of the petition, the court shall enter an order approving the petition as properly filed under this section if satisfied that it complies with this section and has been filed in good faith, or dismiss it if not so satisfied. * * *; and if any such petition shall be so approved, the proceedings thereon shall continue with like effect as if the corporation had itself filed a petition or answer under this section."

When the corresponding Section 142 of Chapter X of the Chandler Act was enacted, the above provisions were eliminated. This section provides as follows:

> "SEC. 142. DEBTOR FAILING TO FILE ANSWER OR FILING INSUFFICIENT ANSWER.—If an answer is not filed by a debtor to a petition against it, or if the answer filed does not controvert any material allegations of the petition, the judge shall enter an order approving the petition if satisfied that it complies with the requirements of this chapter * * * and has been filed in good faith, or dismissing it if not so satisfied."

Prior to the enactment of the Chandler Act, a number of decisions construed Section 77B, subdivision (a) of the Bankruptcy Act to the effect that an answer of a debtor which admits the jurisdiction of the court, the material allegations of the petition and consents to reorganization under that section, automatically converts the involuntary proceeding into a voluntary one, making it unnecessary to prove acts of bankruptcy on the part of the debtor.

> *Matter of Park Beach Hotel Building Corp.*, 96 Fed. (2nd) 886 (7th Circuit);
> *Matter of Palisades-on the Desplaines, Debtor*, 89 Fed. (2nd) 214.

The fact that, when the corresponding Section 142 of the Chandler Act was enacted, the former provisions of Section 77B, subdivision (e) were not re-enacted, indicates that there was no intent on the part of Congress to convert an involuntary proceeding into a voluntary one by the answer of the debtor, particularly since creditors and stockholders, if debtor is solvent, are now given an unrestricted right to file answers to the petition.

In *In re Elmsford Country Club*, 50 Fed. (2nd) 238 (U. S. D. C., Southern District of New York, 1931), Judge Patterson, then sitting as District Judge, at page 239, said:

> "It has been decided in several cases that the filing of an answer by an alleged bankrupt asking that he be adjudged bankrupt, does not convert an involuntary proceeding into a voluntary one. *In re Supreme Lodge, supra.* See also, *in re Condon* (C. C. A.), 209 F. 800; *Central State Bank* v. *Harrington* (C. C. A.), 4 F. (2d) 514."

See also:

> *In re Supreme Lodge*, 286 Fed. Rep. 180;
> *In re L. Humbert Co.*, 100 Fed. 439, at p. 440;
> *Albers Commission Co.* v. *Richter*, 251 Fed. 869.

An involuntary proceeding can be converted into a voluntary one only by statute. As such former provisions which were included in Section 77 B (a) have now been eliminated by Section 142, it necessarily follows that it was incumbent on the petitioning creditors to prove that the debtor committed an act of bankruptcy within four months prior to the filing of the petition, particularly where, as in this case, the original answer was amended upon the trial so as to deny insolvency and acts of bankruptcy as alleged in petition (R. 493).

This proposition of law is very ably and thoroughly discussed in the opinion of the Circuit Court (R. 721-723).

Section 131 of the Bankruptcy Act, in part, provides as follows:

> "SEC. 131. CREDITORS' OR INDENTURE TRUSTEE'S PETITION; CONTENTS.—A creditors' or indenture trustee's petition shall, in addition to the allegations required by section 130 of this Act (Sec. 530 of this title), state—
>
> * * * * *

5. That the corporation has committed an act of bankruptcy within four months prior to the filing of the petition."

The burden of sustaining such proof was on the petitioning creditors.

In re Cook (C. C. A., 7th Cir.), 104 Fed. (2d) 981; *Shingleton* v. *Armour Boulevard Corporation,* 107 Fed. (2d) 440 (8th Cir.).

POINT III.

The proper administration of proceedings under Chapter X has in no way been impeded by the decision of the Circuit Court of Appeals, Second Circuit, but on the contrary, said decision promotes the proper administration of justice by preventing directors of a corporation from fraudulently filing a consent to a sham involuntary petition.

A FRAUD WAS PERPETRATED ON THE DISTRICT COURT BY THE PETITIONING CREDITORS BY THE FILING OF A PETITION THAT COULD NOT HAVE LEGALLY BEEN FILED IN THE FIRST INSTANCE. A FRAUDULENT FILING OF AN INVOLUNTARY PETITION CANNOT BE CURED BY ANY ANSWER OR OTHER ACTS OF THE DEBTOR.

The evidence indicated without contradiction that no act of bankruptcy was committed within four months prior to the filing of the petition (R. 414). At the time of the filing of the petition, the attorney for the petitioning creditors admitted that he knew of no act of bankruptcy (R. 513-4). The creditors were familiar with the financial set-up and transactions of the debtor and claimed that the debtor was perfectly solvent (R. 508). Notwithstanding these facts, the petitioning creditors, in their involuntary petition, alleged that the debtor was insolvent,

that the capital stock was worthless, and that an act of bankruptcy had been committed within four months next preceding the filing of the petition (R. 8). They could not legally file a petition unless they complied with Section 131, subdivision 5, by truthfully alleging that the corporation had committed an act of bankruptcy within four months prior to the filing of the petition. The allegation contained in the petition of the commission of an act of bankruptcy was false. Under such circumstances, a fraud was perpetrated. The filing of the answer by the debtor, acting through a hostile board of directors who had similar knowledge, aided and abetted the commission of a fraud on the district court. It would be against public policy to permit the petitioning creditors to gain a legal advantage by such fraudulent conduct.

The Circuit Court, in its opinion, said (R. 720):

> "It is indeed true, if we take the petition and answer together, that enough can be spelled out to satisfy the requirements of Sec. 130. The answer itself declares that the debtor is 'unable to pay its debts as they mature,' and not only consents to the approval of the petition, but prays that it should be approved; the other necessary facts it admits by not denying them. Rule 8 (d). Thus the debtor has expressly or impliedly made all the declarations that it need have made if it had filed a petition."

However, subsequent to the filing of this answer, the debtor, acting through its old board of directors, by and with the consent of the petitioning creditors amended its answer during the trial of the issues, so as to deny insolvency and the acts of bankruptcy alleged in the involuntary petition (p. 493). Under such circumstances, the petition and answer, as amended, taken together, do not spell out sufficient facts to satisfy the requirements of Section 130.

POINT IV.

The petitioners cannot question the applicability of Rule 15 (a) of the Federal Rules of Procedure, as no such question was raised by them in the court below.

For the first time, the petitioners claim that Rule 15 (a) of the Federal Rules of Civil Procedure does not apply to a Chapter X proceeding. It is too late to raise that point now, as no such objection was made in the court below.

Duignan v. *United States,* 274 U. S. 195, 200.

Furthermore, such claim is frivolous, as General Order in Bankruptcy No. 37 makes such rules applicable to all bankruptcy proceedings.

Rule 15A of the Federal Rules of Civil Procedure, relating to the filing of amended and supplemental pleadings, provides, in part:

> "* * * and leave shall be freely given when justice so requires."

The liberality in pleading and the free power of amendment as given by the new federal rules of civil procedure have been fully recognized by the various circuit courts. *Downey* v. *Palmer,* 114 Fed. (2d) 116 (Aug. 12, 1940). *Globe Paper Co.* v. *Travis Drug Co.,* 112 Fed. (2nd) 350 (6th Cir. June 7, 1940); *Shoreland Co.* v. *Conklin* (C. C. A. 5th Cir.) 30 Fed. (2d) 489, 490; *Kroell* v. *N. Y. Ambassador,* 108 Fed. (2nd) 294 (2nd Cir.).

In *Remington on Bankruptcy,* 4th Ed., Volume 1, it is stated, at pages 489-490:

> "SEC. 383. AMENDMENT OF ANSWER.—Amendment of the answer may be allowed, and it may be error to refuse amendment in a proper case; as for example, where officers of a corporation, negligent in their

duties, or adverse in interest, or in collision with the petitioning creditors, have answered, the court may allow stockholders to intervene, and to amend the answer, and to make defense."

POINT V.

It is not the policy of this court to grant a writ of certiorari to review conflicting evidence.

The opinion of the Circuit Court is based on conflicting evidence presented before the District Court which was up for review. Its decision reversing the order of confirmation of the Special Master's report, and granting in its discretion permission to the debtor to file an amended answer, is based on the evidence which was reviewed by the Circuit Court.

Under such circumstances, this court has held that it will not grant a writ to review conflicting evidence.

United States vs. *Johnston*, 268 U. S. 220, 227.

POINT VI.

The order sought to be reviewed is interlocutory only, and not a final order, and presents no question of law of public or exceptional importance.

The petitioners have failed to show any gravity or any question of general importance or any conflict in the various decisions of the Circuit Courts which would warrant the granting of a writ of certiorari, which is only granted by this Court in extraordinary and exceptional cases.

Denver v. *N. Y. Trust Co.*, 229 U. S. 123;
American Const. Co. v. *Jacksonville Ry. Co.*, 148 U. S. 372, 384;
Magnun Co. v. *Coty*, 262 U. S. 159, 163.

POINT VII.

The petition for a writ of certiorari should in all respects be denied, with costs.

Respectfully submitted,

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